UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Devon Power LLC	)	Docket Nos. ER03-563-030
	)	ER03-563-055
	)	
	)	

REQUEST FOR REHEARING AND MOTION FOR CLARIFICATION OF THE STATE OF MAINE PUBLIC UTILITIES COMMISSION AND THE MAINE PUBLIC ADVOCATE

Pursuant to Rules 212 and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"),[1] the State of Maine Public Utilities Commission ("MPUC") and the Maine Public Advocate (collectively, the "Maine Parties") hereby request rehearing of certain decisions, and move to clarify another, that the Commission reached in its order issued in the above-captioned dockets on June 16, 2006.[2]

The Commission should not have accepted the contested settlement agreement, and with it the proposed design for a forward capacity market in New England that fails to reasonably account for differing circumstances across the region. During the transition period alone, Maine customers will bear a $300 million rate increase to "ensure" there is sufficient capacity available, notwithstanding the existence of an abundance of existing surplus capacity as well as new power supplies under development in the state. Disregarding Maine's interests is particularly troublesome because Maine has probably gone as far as any state in embracing competitive electricity markets and in opening its doors to new generation. At a time of increasing skepticism about the competitive model

---

1 18 C.F.R. §§ 385.212 and 385.713 (2006).

2 *See Devon Power LLC*, 115 FERC ¶ 61,340 (2006) ("Settlement Order").

and increasing resistance to siting generation, both in Maine and elsewhere, it is imperative that Maine receive the full locational benefits of pursuing those policies.

Given the paucity of relevant evidence supporting the settlement, especially with regard to the interim rate, and the existence of genuine issues or material fact, the Commission should initiate procedures to gather the substantial evidence necessary to reach a reasoned decision. Relying on the abandoned LICAP mechanism, which no one now champions as being worthy, for a *relative* finding of reasonableness, does not satisfy the applicable standards for upholding a contested settlement. The Commission should also explain how it accounts for the factual evidence provided by Dr. Thomas Austin, which was effectively ignored in the Settlement Order. In addition to the evidentiary issues, by accepting the settlement the Commission sanctioned the involuntary elimination of rights established under the Federal Power Act. This the Commission cannot do, no matter how limited the scope of the infraction may be. Accordingly, the Commission should grant this rehearing and avail itself of the procedural remedies under the *Trailblazer*[3] standard to develop a complete record upon which to issue a decision, and otherwise modify the settlement to comply with the Federal Power Act.

The Maine Parties also ask the Commission to clarify that ISO New England, in implementing the forward capacity market, should adhere to its commitment, expressed in the settlement agreement, the associated explanatory statement, and ISO-NE's settlement reply comments to determine whether export constraints bind not by administrative fiat, but in accordance with the auction process. While this position has

---

[3] 87 FERC ¶ 61,110 (1999).

not been disputed, the fact that the Commission did not expressly acknowledge its acceptance may lead to confusion. Accordingly, such clarification is necessary.

I. BACKGROUND

This proceeding arose in a dispute over the level of compensation to which generators would be entitled when their units were designated Reliability-Must-Run ("RMR") in a chronically constrained area (also known as a "load pocket" or, in New England, a "Designated Congestion Area" ("DCA")) in Southwestern Connecticut ("SWCT").[4] While the Commission set forth the cost-recovery parameters for the RMR units, it also initiated the steps toward the development of a capacity market.[5] In particular, the Commission sought to develop a location-specific capacity requirement, "so that energy markets alone are not the only way for suppliers in DCAs to recover costs."[6] Accordingly, the Commission directed the ISO to establish a mechanism that appropriately values and compensates New England capacity *based on location.*[7]

In response to the Commission's directive, on March 1, 2004, the ISO filed its LICAP proposal. In setting the proposal for hearing, the Commission made observations and findings that indicated the importance the Commission placed on incorporating locationality into the market structure. For example, the Commission observed:[8]

> In particular, *there are more generation resources within Maine than are necessary to meet local requirements*

---

4 *See Devon Power LLC, et al.,* 103 FERC ¶ 61,082 (2003).

5 *Id*. at PP 1, 32.

6 *Id*. at P 31.

7 *Id*. at P 37.

8 *See Devon Power LLC, et al.,* 107 FERC ¶ 61,240 at P 9 n.16 (2004) (emphasis added).

> *within Maine or that can be exported from Maine*. Additionally, ISO-NE has identified two areas[,] Southwest Connecticut and Northeastern Massachusetts[,] [("NEMA")] as being load pockets. Because of transmission constraints, there are limitations on the amount of power that can be imported into these regions. As a result, at times resources located within the load pockets must be used to meet demand in the load pockets.

Similarly, the Commission found that:[9]

> The two geographic areas in New England that have reliability problems are NEMA/Boston and SWCT, which currently are identified as DCAs.

Ultimately, the Commission concluded:[10]

> The New England market as a whole appears to have adequate capacity. At the same time, nearly all existing units within SWCT are needed for reliability. Additionally, ISO-NE has also recently conducted a Request for Proposals to obtain additional resources in SWCT. *Thus, the use of a local capacity market would better reflect the value of capacity in SWCT than the existing system-wide capacity market.* Thus, the use of a locational capacity market could be a solution to the Reliability Compensation Issues in SWCT.

Maine (and others) took issue with the LICAP proposal, in part, on the grounds that it failed to meet the locational objectives set by the Commission. As explained on brief: "[b]ecause the [LICAP] proposal fails to price differentiate load pockets from areas with sufficient or excess generation, the proposal adopted in the Initial Decision fails to meet the locational component" of a resource adequacy mechanism.[11]

---

9 *Id*. at P 49.

10 *Id*. at P 37 (citations omitted) (emphasis added).

11 Initial Brief of the Maine Public Utilities Commission, the Maine Public Advocate, the Vermont Department of Public Service and the Vermont Public Service Board, Docket Nos. ER03-563-030 and EL04-102-000 (April 15, 2005) at 16.

On September 20, 2005, in response at least in part to the "sense of Congress" that the Federal Energy Regulatory Commission "carefully consider the States' objections" to LICAP,[12] the Commission held oral argument on the LICAP proposal and possible alternatives. In introductory remarks, Chairman Kelliher noted his particular concern that there was little new generation being constructed in the NEMA and SWCT load pockets. He also articulated his commitment to considering alternatives to LICAP that would provide a greater assurance of entry of new generating capacity as compared to the LICAP proposal itself.[13] One such alternative, submitted shortly before the oral argument by the MPUC and others, was a locational capacity market structure based on the "Central Resource Adequacy Markets" ("CRAM") model, which had been developed by National Economic Research Associates ("NERA"), with modifications to reflect certain components of the LICAP proposal and also some aspects of PJM's Reliability Pricing Model.[14] In order to explore the possibility of a negotiated solution, the Commission initiated settlement proceedings.

Per the subsequent orders that Judge Brenner issued in this proceeding, a series of formal settlement meetings took place in Boston and Washington. As the time for reaching a decision expired, and interested parties met for the last time on January 30, 2006, it was clear to the MPUC that the settlement was not just and reasonable, was unsupported by the record, and would visit undue harm on Maine consumers.

---

12 Energy Policy Act of 2005, Section 1236 (not codified).

13 Oral Argument Transcript at 4, line 13-14.

14 The proposal also envisioned locational transition payments . Four State Commission Proposed Alternative to LICAP, Docket No. ER03-563 (September 13, 2005) at 13.

On June 16, 2006, the Commission issued an order accepting the proposed settlement without condition or modification, based on a finding that the terms of the settlement were just and reasonable and in the public interest.

II. STATEMENT OF ISSUES/SPECIFICATION OF ERRORS

Pursuant to Rule 713(c),[15] the Maine Parties raise the following issues and identify the following errors in the Settlement Order:

1a. Does the relevant evidence in the record in this case support acceptance of the proposed Settlement Agreement?

1b. Does the relevant evidence in the record in this case support a finding that as a package, the settlement agreement is a just and reasonable outcome for this proceeding consistent with the public interest?

The Commission erred in accepting the proposed settlement, and finding that the settlement is just and reasonable and in the public interest. There is insufficient relevant evidence in the record upon which to base such a decision.

Representative Precedent:

New Orleans Public Service, Inc. v. FERC, 659 F.2d 509 (5th Cir. 1981).

Trailblazer Pipeline Co., 87 FERC ¶ 61,110 (1999).

18 C.F.R. § 602 (2006).

2. Has the Commission adequately addressed the evidence offered by Dr. Thomas Austin, and arguments made by the Maine Parties which demonstrate that the settlement agreement is not just and reasonable and is not consistent with the public interest?

The Commission erred by ignoring virtually all of the evidence offered by Dr. Austin, which highlights legitimate objections to the proposed settlement; the Commission also failed to respond to arguments made by the Maine Parties. As a result, the Commission's decision to accept the proposed settlement is arbitrary and capricious.

---

15 18 C.F.R. § 385.713(c) (2006).

Representative Precedent:

Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co., 463 U.S. 29, 43 (1983).

Canadian Association of Petroleum Producers v. FERC, 254 F.3d 289 (D.C. Cir. 2001).

PPL Wallingford Energy LLC, et al., 419 F.3d 1194 (D.C. Cir. 2005).

3. Is the Commission's adoption of the public interest standard, as it pertains to those parties that did not sign the Settlement Agreement, allowable under the Federal Power Act?

   The Commission erred when it accepted the provisions of the proposed settlement that adopt the public interest standard and thereby deprive those that did not sign of their rights under Section 206 of the Federal Power Act.

Representative Precedent:

Atlantic City Elec. Co. v. FERC, 295 F.3d 1 (D.C. Cir. 2002).

ISO New England, Inc., et al., 109 FERC ¶ 61,147 (2004).

III. REQUEST FOR REHEARING

A. THERE IS INSUFFICIENT EVIDENCE IN THE RECORD UPON WHICH TO ACCEPT THE SETTLEMENT, DETERMINE THAT IT IS JUST AND REASONABLE, AND DETERMINE THAT IT IS CONSISTENT WITH THE PUBLIC INTEREST.

In the Settlement Order, the Commission concludes that the proposed settlement, overall, is just and reasonable.[16] Under *Trailblazer*, however, the Commission cannot reasonably reach that conclusion because there is insufficient record evidence to support approval of the proposed settlement, and genuine issues of material fact exist that cannot be resolved on the current record.

[16] Settlement Order at PP 68-71.

Approval of a contested settlement has been likened to the granting of a motion for summary judgment when no genuine issues of material fact exist.[17] To that end, in *Trailblazer Pipeline Co.,* the Commission has summarized the standards for reviewing contested settlements as follows: [18]

> [T]he Supreme Court has held that where a settlement is contested, the Commission must make "an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable' rates." Consistent with this requirement, Rule 602(h)(1)(i) of the Commission's settlement rules provides that *the Commission may decide the merits of contested settlement issues only if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines that there is no genuine issue of material fact.*
>
> If the Commission finds that the record lacks substantial evidence, or finds that contesting parties or issues cannot be severed, Rule 602(h)(1)(ii) provides for the Commission either (A) to establish procedures for the purpose of receiving additional evidence on the contested issues or (B) to take other action which the Commission determines to be appropriate.
>
> Finally, Rule 602(h)(1)(iii) provides that the Commission may sever either the contesting parties or the contesting issues from a settlement, while approving the remainder of the settlement as an uncontested settlement. The practice of severing contesting parties was adopted by the Commission as a method of giving consenting parties the benefit of their bargain, while providing the contesting parties an opportunity to have their objections decided on the merits.

---

17 *See New Orleans Public Service, Inc. v. FERC*, 659 F.2d 509, 512 (5th Cir. 1981)("approval of a contested settlement is like the granting of a motion for summary judgment when there exist no genuine issues of material fact").

18 *See* 87 FERC ¶ 61,110 at 61,438-39 (1999) (citations omitted) (emphasis added).

The proposed settlement will result in a rate increase of at least $300 million to Maine ratepayers during the transitional period alone over the next few years. The overall cost of the settlement is estimated at nearly $5 billion for the region over the same period. Such a significant financial impact renders the transitional rates so fundamental to the overall effect of the proposal that their unreasonableness taints the overall settlement agreement. The dearth of evidence on this point is not surprising since the transitional rates are the product of settlement discussions that occurred only recently. The hearings previously held in this case focused on an entirely different and now-abandoned capacity mechanism, and occurred well before the proposed transitional rates were even contemplated.[19] Even at the oral argument held in September 2005, the discussion regarding alternative designs for the capacity market did not delve into any details as to what would make for a reasonable transitional rate.

This evidentiary quandary cannot be resolved by measuring the cost of the transitional mechanism against the projected cost of a proposal never adjudicated by the Commission, roundly criticized by transmission and distribution utilities, state regulators, and the entire New England Congressional Delegation and ultimately abandoned by everyone (even its former champions). For all of these reasons, the Commission has failed to meet the *Trailblazer* standard in determining that the Maine Parties would be better off under the settlement than if the case were litigated.

The Commission's suggestion that it may make the comparison to the LICAP rates because they had been accepted in an initial decision in this case does not meet the

---

[19] *See Devon Power LLC, et al.,* 111 FERC ¶ 63,063 (2005) (the Initial Decision on the LICAP proposal, issued June 15, 2005, nearly two months before the Energy Policy Act of 2005 became law, and more than three months before the oral arguments at FERC that gave rise to serious discussions regarding an auction-based market solution).

Trailblazer standard.[20] There has been no adjudication from FERC of all of the underlying assumptions, factual determinations and conclusions of law embodied in the ALJ's initial decision. Since FERC has not previously had the opportunity to consider whether the LICAP rates are just and reasonable, any reliance on those rates as the likely outcome of litigation or to set the parameters of the range of reasonableness must be based on something more than a recognition that the administrative law judge recommended adoption of the proposal.

The Settlement Order also suggests that under the demand curves proposed by the load parties, the objecting parties would not reach a more favorable result.[21] The Commission fails to recognize that one of the key objections in the litigation, however, was the Commission's decision to limit the hearing to the consideration of only demand curve approaches and that Congress directed the Commission to consider alternative approaches. Now that a demand curve scenario has been abandoned, it is unreasonable and arbitrary for the Commission to use demand curve proposals that load parties made (under objection because of the narrow scope of the hearing) to determine that the transition payments "fall within the 'range of reasonableness.'"[22]

Furthermore, the record in its current state highlights the fact that genuine issues of material fact have not been resolved. Factual assertions by various parties demonstrate that additional evidence is needed to determine with more certainty the extent of the Maine export constraint, and how it would impact the auction and the prices that Maine

---

20 Settlement Order at PP 72, 90.

21 Settlement Order at P 100.

22 *Id*.

load would pay. For example, the Maine Parties and ISO New England disagree as to how often there were binding export constraints which limit the amount of power that can be exported from Maine.[23] The frequency of the binding constraint is a material fact; the genuine issue must be resolved for the Commission to make a reasoned decision. To accomplish that objective, the Maine Parties should be afforded the opportunity to probe the underlying factual basis for the ISO's factual assertions offered in opposition to the Maine Parties' positions (and the ISO and others should be allowed to probe the Maine Parties' factual basis).

In light of these considerations, the Maine Parties here reiterate the position explained in their comments on the settlement that a procedural approach should be followed consistent with the *Trailblazer* standard[24] to facilitate development of a record of substantial and relevant evidence upon which a fully reasoned decision can be reached and genuine issues of material fact can be resolved. Viable options include: (1) conditional acceptance of the settlement; (2) severance of the contested issues that have been raised and initiation of further procedures designed to resolve those issues; and (3) rejection of the entire settlement and initiation of a hearing. The Maine Parties here reiterate that the Commission should adopt one of these procedural avenues in order to resolve the outstanding evidentiary flaws in this proceeding.

---

23 *Compare* Austin Affidavit at 4-6 *with* ISO Reply Comments at 35.

24 *Id*. at 61,439. *See also* 18 C.F.R. § 385.602(h)(1)(iii) (2005). As discussed below, ISO-NE's claim that Maine is not export constrained is inconsistent with its own recent publications.

B. FERC'S FAILIURE TO CONSIDER THE EVIDENCE OFFERED BY WITNESS AUSTIN AND ARGUMENTS MADE BY THE MAINE PARTIES IS ARIBTRARY AND CAPRICIOUS.

The Maine Parties appended affidavits prepared by Dr. Thomas Austin to both their initial and reply comments on the settlement. These affidavits offered evidence of various flaws in the proposed settlement, to the point that the settlement agreement could not be found just and reasonable, or at least that there exists unresolved genuine issues of material fact. Nevertheless, the Settlement Order fails to addresses these affidavits (other than to note Dr. Austin's assessment of the cost of the transitional mechanism to Maine consumers). The failure to account for virtually all of the evidence submitted in Dr. Austin's affidavits renders the Commission's decision arbitrary and capricious.

Under the Administrative Procedure Act, the Commission should not issue a decision that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[25] To satisfy that standard, the Commission must examine all relevant data and articulate a satisfactory explanation for its action, including a rational connection between the factual findings and the choices made.[26] Failure to respond meaningfully to objections that are raised is arbitrary and capricious.[27] The Commission cannot simply dismiss alternative proposals in a conclusory fashion.[28]

The Settlement Order is conspicuously silent with regard to the evidence offered by Dr. Austin, barely acknowledging its submission, and failing to explain how that

---

25 5 U.S.C. § 706(2)(A).

26 *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co*., 463 U.S. 29, 43 (1983).

27 *See, e.g., PPL Wallingford Energy LLC, et al.,* 419 F.3d 1194, 1198 (D.C. Cir. 2005).

28 *Canadian Assoc. of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001).

evidence factored into the Commission's overall analysis of the issues. It also fails to address the arguments made by the Maine Parties. Among the evidence that Dr. Austin offered, that the Commission failed to address, is:

- congestion data from the energy markets in New England and ISO's own RSP analysis show that Maine is export constrained;[29]
- the fact that there are plans for new generation to be developed in Maine;[30]
- evidence that generators like FPL Energy, which hold significant amounts of nuclear and hydro generation capacity, have experienced increased earnings such that additional revenues from capacity payments are not needed to keep those plants operational;[31] and
- the fact that the transition payments do not contain a Peak Energy Rent ("PER") offset, and the assumed PER in Mr. LaPlante's analysis is too low.[32]

The Commission's failure to consider this and other evidence, which shows that the proposed settlement is not reasonable, by definition, renders its decision arbitrary and capricious. Further, the Commission acted arbitrarily and capriciously in ignoring (1) market data showing price separation in the energy markets and (2) explanations of why LICAP price projections are irrelevant to the determination of whether the transitional mechanism should include a different rate for Maine consumers.

1. The Commission Fails to Address Arguments and Evidence that Maine is Export Constrained.

Dr. Austin's Affidavits provide evidence that Maine is export constrained. Specifically, Dr. Austin demonstrates that Maine is export constrained as reflected in the

---

29 Austin Affidavit at Paragraph 8.

30 Austin Affidavit at Paragraph 10.

31 Austin Affidavit at Paragraph 12.

32 Austin Affidavit at Paragraph 14.

price separation that occurs in the energy markets. Dr. Austin demonstrated, for example, that in July 2005, Maine was export constrained 42.9 percent of the time. Dr. Austin also demonstrated that ISO in its own Regional System Plan report concedes that Maine is export constrained. Finally, the Maine Parties explained that LICAP cost projections were irrelevant to determining whether export constraints exist:

> Because Exhibit No. ISO-24 and the LaPlante Affidavit consider whether constraints will bind under a demand curve, not an auction scenario, these exhibits are irrelevant to determining whether Maine is export constrained. They provide no sound basis to justify the absence of price separation between Maine and the rest of New England, especially when it is clear from the energy market that export constraints *do* bind and result in lower energy prices in Maine.

Reply Comments at 4. The Commission brushed aside all of this information in a few terse sentences:[33]

> Maine Parties argue that the transition payments fail to account for locational differences in capacity levels, and that Maine should pay a lower transition payment because it has a surplus of capacity. However, record evidence does not support altering the transition payment for Maine based on its capacity surplus. The most recent price projections provided by Mr. LaPlante exhibit little to no variability in capacity prices across New England regions for the period covered by the transition mechanism. Furthermore, in areas where import constraints do currently exist, RMR agreements have been approved, and the costs associated with those payments are paid locally. Therefore, for this limited period, it is reasonable to not include a locational feature in the transition mechanism.

The Settlement Order's conclusion that it is reasonable to ignore location in the multi-year transition mechanism is fundamentally flawed. First, the Order fails to acknowledge that "the most recent price projections" upon which the Commission relies

have nothing to do with the settlement. As made clear in the Maine Parties initial and reply settlement comments, the "price projections" relied on by the Commission derived from the modeling of what would occur under the application of the now-defunct, administratively determined LICAP demand curve. They say nothing about how much price separation would occur in an auction that allowed the interaction of bids with actual physical constraints. Second, FERC ignored the only relevant evidence that does provide an indication of whether price separation would occur in the capacity market - market data from the energy markets. This data, and the more recent data published by ISO itself, which shows that Maine is export constrained, cannot be reconciled with a determination that it is reasonable to approve a settlement agreement that continues to ignore the value of capacity based on location. The Order is further flawed in asserting that RMR's provide an adequate locational component. The existence of RMR contracts, in some, but not all of the sub-regions, does not answer the question of whether the amount paid by Maine ratepayers is too much *given FERC's prior rulings that it is essential to value capacity by location*.

Furthermore, new evidence, not available at the time comments on the settlement were being submitted, provides more support for a separate price for Maine consumers. ISO-NE argued in its comments submitted in this proceeding that Maine is not export constrained, but ISO-NE tells a different story in its recently issued reliability report,

---

[33] Settlement Order at P 105.

which states:[34]

> *4.6.3.2 Locked-in Generation Resources in Maine Due to Orrington–South Limitations*
>
> The load in Maine accounts for approximately 9% of New England's total electric energy requirements and about 7.5% of its summer peak demand, yet Maine contains almost 11% of New England's installed capacity (3,200 MW out of 30,050 MW). The output of Maine generators is sometimes constrained by export limitations to the south and west. *When constrained, the Orrington–South, Surowiec–South, Maine–New Hampshire, Northern New England–Scobie + 394 line, Seabrook–South, and North–South transmission interfaces are indicative of Maine export limitations. One or more of these interfaces was constrained about 10.5% of the real-time hours during 2005.* These binding constraints occurred during the on-peak periods about 6% of the time, while off-peak constraints occurred in about 4.5% of all hours. The Orrington–South interface was binding twice as often as the Northern New England–Scobie + 394-line interface. Both of these constraints together represented 75% of all of Maine's export-constrained hours in 2005.

This information, as well as the excerpts from the Regional System Plan quoted by Dr. Austin,[35] refutes ISO-NE's denial that Maine is export constrained.[36] Based on this additional evidence as well as the Commission's failure to examine the evidence provided by Dr. Austin, the Commission should reconsider its decision and set for hearing the issue of Maine's unique situation.

---

34 ISO-NE 2005 Reliability Report at 21-22 (issued June 1, 2006) (emphasis added). The reliability report can be found at: http://www.iso-ne.com/pubs/arr/2005_reliability_report.pdf

35 *See* Supplemental Affidavit of Thomas D. Austin at 4-5.

36 *See* ISO-NE Reply Comments at 35 ("Consequently, the claim that Maine is export constrained must be rejected.").

2. The Settlement Order Fails to Acknowledge the Addition of New Generation Under Development in Maine.

Dr. Austin stated that additional wind and other generation projects were being planned for Maine, which would further exacerbate the constraint. This evidence has not been rebutted. In fact, currently Maine has nearly 1,000 MW of new non-gas-fired generation capacity under construction, in the permitting process or under serious consideration by developers.[37] These projects have expected in-service dates between 2006 and 2009.

3. The Commission Fails to Address Evidence that the Settlement Will Provide Windfalls to Some Generators.

The Commission relies on statements made at oral argument about the need for a new capacity system, but failed to acknowledge evidence supplied by Dr. Austin that the owner of the largest amount of generation in Maine - FPL Energy - posted very healthy earnings. The Commission states:[38]

> At the oral argument, the parties almost unanimously agreed that the status quo presents significant problems that the Commission must address. The record from the oral argument is replete with virtually unchallenged statements that existing generators needed for reliability are not earning sufficient revenues (and are in fact losing money), and that additional infrastructure is needed soon to avoid violations of reliability criteria.

---

[37] *See* Interconnection Study Status, posted June 29, 2006 on the ISO web site at the following link: http://www.iso-ne.com/genrtion_resrcs/nwgen_inter/status/index.html In addition to the projects listed there, two new wind farms are being planned (one has already been sited), which will add more than 500 MW of new capacity in Maine.

[38] Settlement Order at P 63.

However, Dr. Austin stated in his affidavit, that generators such as FPL were recently experiencing very significant earnings increases:[39]

> In today's market, I believe that many generators would remain on the system regardless of any transition payments. Given today's level of gas and oil prices and the role they play in setting market energy prices, many generators that use other fuels are doing rather well. For example, in its Fourth Quarter Release, FPL Energy, whose New England holdings include significant amounts of nuclear and hydro generation reported a 70% increase in earnings for 2005 and cited "significantly improved market conditions" in the NEPOOL Market.[22]

While the Settlement Order states that "one of the Commission's stated goals in this proceeding is to ensure that existing generators are appropriately compensated,"[40] the Order fails to accomplish this because it does not look at the costs and earnings of generators in Maine and does not value their product based on location.

The Settlement Order also failed to address arguments and evidence that the windfall for existing power supplies will be exacerbated by the lack of a PER offset during the transition period, like the one that has been incorporated into the Forward Capacity Market ("FCM"), or some other protective mechanism. Because suppliers keep the PER during the transition period, there is no hedge against energy spikes, nor any disincentive for suppliers raising energy prices. The Settlement Order's failure to address arguments and evidence of windfalls from the transition period is arbitrary and capricious.

---

39 *See* Austin Affidavit at P 12.

40 Settlement Order at P 102.

C. FERC'S ASSERTION THAT PRICE SEPARATION IN AN AUCTION MECHANISM WOULD NECESSARILY BE THE RESULT OF THE EXERCISE OF MARKET POWER IS THEORETICALLY AND FACTUALLY INCORRECT.

The Commission concludes that there may be advantages to the Maine Parties' contention that the market should be allowed to determine whether there is price separation. However, the Commission ultimately rejects this contention by concluding that this could result in sellers attempting to exercise market power to raise the price in potentially constrained zones. The Commission's market power rationale is flawed because it advocates the elimination of opportunities for market power abuse *by simply eliminating the market (auction) approach.* This is a slippery slope.

By the Commission's logic, the fact that it might be easier to exercise market power in a locational energy market than in a non-locational market suggests that the locational energy market should be eliminated too. Taken further, the elimination of the entire energy market will protect against the possibility of abuse. While it is unlikely that the Commission seeks to abandon competitive markets, the Commission's conclusion fails to explain the distinction between the potential problems of market abuse in the capacity market versus those in the energy market, where price separation is allowed to occur through a market approach (with vigilance and safeguards against the exercise of market power).

Indeed, to protect against market power the best approach is to police for market power abuse, not to set up a market that ignores the bids of suppliers and the physical capabilities of the transmission system. In fact, the settlement contains a number of features specifically designed to reduce or eliminate market power, and these may well be

adequate to reduce, if not eliminate, the impact of market power abuse in constrained areas.

D. THE SETTLEMENT AGREEMENT INAPPROPRIATELY DEPRIVES NON-SETTLING PARTIES OF THEIR RIGHTS UNDER THE FEDERAL POWER ACT.

Section 4.C of the Settlement Agreement states that the public interest standard shall be used to assess any challenge to the Capacity Clearing Prices derived through the forward capacity auction and the prices resulting from reconfiguration auctions, as well as any challenges to agreements regarding the transition period, "whether the change is proposed by a Settling Party, *a non-Settling Party*, or the FERC acting *sua sponte*."[42] The Commission's claim that this provision "does not operate to the detriment of the parties who have not signed on to the Settlement Agreement"[43] is simply wrong.

Section 4.C deprives non-settling parties of their rights under Section 206 of the Federal Power Act. Section 206 states:[44]

> Whenever the Commission, after a hearing held upon its own motion *or upon complaint*, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is *unjust, unreasonable, unduly discriminatory or preferential*, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

---

42 Settlement Agreement, Section 4.C (emphasis added).

43 Settlement Order at P 184.

44 16 U.S.C. § 824e(a) (emphasis added).

Thus, by statute, a party seeking to challenge a rate may do so by initiating review under Section 206 pursuant to the just and reasonable standard. While parties to a contract can voluntarily give up their rights under the Federal Power Act, the Commission cannot forceably deprive a party of its rights under the Federal Power Act.[45]

The Commission's conclusion that imposing the public interest standard on parties that did not sign the settlement agreement is acceptable because the interpretation of the public interest standard as being "practically insurmountable"[46] has been discarded is flawed. Notwithstanding the evolution of the jurisprudence on the standard, it does not change the fact that the public interest standard is harder to satisfy than the "unjust and unreasonable" standard under Section 206. By mandating a higher standard, whether a little higher or a lot higher is irrelevant, the Commission diminishes the rights of the non-signatories under the Federal Power Act. There is no statutory basis to justify that result. Similarly, the suggestion that the elimination of statutory rights is acceptable if the scope of its impact is somehow limited[47] does not justify the decision. Statutory rights cannot be taken away no matter how limited their impact may be. Furthermore, Commission precedent indicates it is appropriate to reject application of the public interest standard when doing so would impact the Commission's ability to protect broad market interests.[48]

The ability to challenge all aspects of the proposed capacity markets is critical because the market design is new and untested. Like California in the 1999 to 2003

---

45 *See Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10-11 (D.C. Cir. 2002); *aff'd* 329 F.3d 856 D.C. Cir. 2003 (granting petition for enforcement).

46 *See Papago Tribal Utilities Authority,* 723 F.2d 950, 954 (D.C. Cir. 1983).

47 *See* Settlement Order at 182-186. *See also* Settlement Order (Kelly, concurring).

48 *See ISO New England, Inc.*, et al., 109 FERC ¶ 61,147 at PP 72-74 (2004).

period, and other instances of deregulated markets functioning improperly, the results might not be consistent with the intentions. The ability to challenge all aspects of the new capacity markets must be preserved for those who do not wish to relinquish it. Accordingly, the portions of the settlement agreement that adopt a public interest standard must be rejected.

IV. MOTION FOR CLARIFICATION

A. FERC SHOULD CLARIFY THAT ISO NEW ENGLAND WILL ACCOUNT FOR EXPORT CONSTRAINTS AS PART OF THE AUCTION PROCESS.

Section III.A.5 of the Settlement Agreement, which generally addresses zonal selection criteria and locational pricing, states: "Export-constrained zones are modeled in the [forward capacity auction]."[49] In reply comments filed with the Commission in this case, ISO New England confirmed that "[e]xport constraints will be modeled in the auction . . . ."[50] In its summary of the party's positions, the Commission recited the ISO's reply comments,[51] but it did not explicitly require the ISO to model export constraints through the auction. The Maine Parties believe modeling exports through the auction is critical to the functions of the capacity markets in New England. Given its importance, and the fact that no party has taken issue with the ISO's intention, as reflected in the settlement, the Maine Parties respectfully request that the Commission clarify that the ISO should model export constraints in the auction.

---

49 Settlement Agreement at 20.

50 Docket Nos. ER03-563-000, et al., Reply Comments Regarding Settlement Agreement of ISO New England Inc., (April 5, 2006) at 43.

51 Settlement Order at P 119.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Commission should reject the settlement agreement as proposed, and instead: (1) initiate procedures designed to gather the substantial evidence needed to reach a decision on the reasonableness of the proposed settlement and upon which outstanding genuine issues of material fact may be resolved, so that appropriate capacity rates can be determined, particularly for ratepayers in the State of Maine during the interim period; (2) modify the settlement agreement to reinstate for those who have not signed it the rights granted under the Federal Power Act; and (3) clarify that the ISO should determine whether export constraints bind pursuant to the auction process.

Respectfully submitted,

/s/ Stephen G. Ward

Stephen G. Ward
Maine Public Advocate
112 State House Station
Augusta, Maine 04333-0112
Telephone: (207) 287-2445
Facsimile: (207) 287-4317
e-mail: Stephen.G.Ward@maine.gov

/s/ Lisa C. Fink

Lisa C. Fink
Senior Staff Attorney
State of Maine Public Utilities Commission
242 State Street
18 State House Station
Augusta, ME 04333-0018
Tel: (207) 287-1389
Fax: (207) 287-1039
lisa.fink@maine.gov

/s/ John R. Matson, III

_____

Richard M. Lorenzo
John R. Matson, III
Harkins Cunningham LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3817
(202) 973-7600

Attorneys for the Maine Public
Utilities Commission

Dated: July 17, 2006

Certificate of Service

In accordance with Rule 2010 of FERC's Rules of Practice and Procedure,[52] I hereby certify that I have served a copy of the foregoing upon those parties listed on the official service list prepared by the Secretary of the Commission in this proceeding.

Dated at Washington, D.C.,
this 17th day of July, 2006

/s/ John R. Matson, III

_____

John R. Matson, III
Harkins Cunningham LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3817
(202) 973-7600

52 18 C.F.R. § 385.2010 (2006).